No. 11735

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE, a nonprofit California corporation,

Bankrupt,

vs.

PAUL W. SAMPSELL, L. BOTELER and McINTYRE FARIES (as successor to Stewart McKee), the duly qualified and acting trustees in bankruptcy of the estate of Christ's Church of the Golden Rule, a nonprofit California corporation, bankrupt, and FRANK C. WELLER, THOMAS S. TOBIN, and MARTIN GENDEL,

Appellants.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.*

I.

Jurisdictional Statements.

A. The District Court Had Jurisdiction of This Cause.

As a court of bankruptcy, the District Court of the United States had jurisdiction of this cause pursuant to

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*To distinguish between the Transcript of Record in Appeal No. 11370 (incorporated herein by reference through the permission and order of the Court made on the 22nd day of August, 1947), and the Transcript of Record in the instant appeal we shall designate the first Transcript in No. 11370 as: "Old Tr."

the acts of July 1, 1898. Chapter 541, Secs. 1 and 2, 30 Stat. 544, 545, as amended; 11 U. S. C. A. (Supp.), Secs. 1 and 2 (1943). On November 1, 1945, the bankrupt filed a petition under Chapter XI of the Bankruptcy Act, in this proceeding. On November 15, 1945, the bankrupt filed a request for adjudication in the Chapter XI proceeding, and on the same day, it filed, in the same proceedings, its voluntary petition in bankruptcy [Old Tr. p. 2]. On November 19, 1945, Hon. William C. Mathes, Judge of the District Court, dismissed the bankrupt's plan of arrangement under its Chapter XI petition, and adjudged it a bankrupt [Old Tr. p. 4]. Thereafter, the matter was duly referred to Referee Benno M. Brink, as the referee in the within proceedings [Old Tr. p. 4]. On December 4, 1945, the first meeting of creditors was held before this referee and this meeting was continued to January 2 and 3, 1946; on January 3, 1946, Messrs. Paul W. Sampsell, L. Boteler and Stewart McKee were duly elected by the majority of the voting creditors in both number and amount, and they qualified as the trustees in this proceeding. On January 11, 1946, the said trustees presented to the referee their formal petition for leave to employ Frank C. Weller of Craig and Weller, Thomas S. Tobin, Martin Gendel and Irving M. Walker as the attorneys for the trustees [Old Tr. pp. 9-12]. By orders dated January 14 [Old Tr. pp. 13-14], and January 22, 1946, the referee granted the application of said trustees as to Irving M. Walker, but denied the application as to the remaining proposed counsel. The primary order

from which the original review to the District Judge was taken is the order of the referee dated January 22, 1946 [Old Tr. pp. 20-35].

Within ten days after the entry of the referee's order the appellants herein, Frank C. Weller, Thomas S. Tobin and Martin Gendel were allowed by order of the District Judge to intervene and be parties to the appeal from the said order [Old Tr. p. 66]; thereafter the trustees and said interveners, as appellants herein, filed their petition for review by the District Judge (Act of July 1, 1898, Chapter 541, Sec. 39(a); 30 Stat. 555, as amended; 11 U. S. C. A. Sec. 67, subd. a (1943) [Old Tr. pp. 36-41]. The matter was argued on February 20, 1946, and Hon. William C. Mathes, as District Judge, ultimately made an order on May 13, 1946, which order was entered in the Civil Order Book at page 4 on said date, and docketed therein on the same day; said order confirmed the previous orders of the referee as described above [Old Tr. pp. 69-75].

An appeal was taken to this Honorable Court from the aforesaid order of the District Judge affirming the order of the Referee, and this Court, in Civil Appeal No. 11370, by opinion filed on the 15th day of November, 1946,[1] reversed the order of the District Judge and remanded the matter for further proceedings; thereupon,

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[1]For convenience, we have set forth in the Appendix to this brief a copy of the opinion of this Court in Civ. App. No. 11370. [See Appendix.]

the appellants, Paul W. Sampsell, L. Boteler and Stewart McKee, filed a verified petition, dated the 10th day of December, 1946, requesting the Referee in Bankruptcy to grant a court hearing as directed by this Honorable Court on the original petition for the employment of Frank C. Weller, Thomas S. Tobin and Martin Gendel as their permanent counsel, said petition having been filed on the 11th day of January, 1946 [Tr. pp. 24-25].

Thereafter, the Referee in Bankruptcy conducted hearings upon the aforesaid petitions and made his Findings of Fact and Conclusions of Law and Order thereon upon the 12th day of February, 1947, again denying the original petition of the trustees for leave to employ appellants Frank C. Weller, Thomas S. Tobin and Martin Gendel. [Tr. pp. 28-37.]

Within the time allowed by law, the appellants herein, Paul W. Sampsell, L. Boteler, Stewart McKee, Frank C. Weller, Thomas S. Tobin and Martin Gendel, filed a petition for review [Tr. pp. 37-42] of the Referee's order denying the right of said trustees to employ the aforenamed counsel, and the matter was again argued before the Honorable William C. Mathes, as District Judge, on the 24th day of March, 1947; the petition for review was taken under submission by said District Judge and was not decided until an order was made by him on July 11, 1947, on the petition for review of the Referee's order of February 12, 1947; said order, in effect, vacated and set aside the findings of fact and conclusions of law contained in the Referee's order and recommitted to the Referee, with directions, the original petition of the trustees (appellants) for leave to employ the attorneys (likewise appellants herein) named therein. [Tr. pp. 44-49.]

B. The Circuit Court of Appeals Has Jurisdiction of This Appeal.

Within the time allowed by law, your appellants filed a notice of appeal [Tr. p. 50] and have taken the steps required by law, presenting the necessary record on the within appeal.

The jurisdiction of the Circuit Court of Appeals is invoked pursuant to Secs. 24 and 25 of the Bankruptcy Act (Act of July 1, 1898, Chapter 541, Secs. 24 and 25; 30 Stat. 553 as amended; 11 U. S. C. A. (Supp.) Secs. 47 and 48 (1943).) Appellate jurisdiction over this proceeding in bankruptcy vested in the Circuit Court of Appeals upon the filing on August 19, 1947, of the notice of appeal, the amount involved being in excess of $500.00, and the appeal being taken by the trustees in bankruptcy.

II.

Statement of the Case.

This appeal is from the order of the District Court entitled "Order of Judge on Petition for Review of Referee's Order of February 12, 1947," dated and entered on July 11, 1946. [Tr. pp. 44-49]. This order in turn vacated and set aside the findings of fact and conclusions of law and order of the Referee in Bankruptcy dated February 12, 1947 [Tr. pp. 28-37], and recommitted to the Referee the original petition of appellants herein, filed on January 11, 1946, with directions. The Court's hearing on the petition of the trustees in bankruptcy, who are appellants herein, filed by them on January 11, 1946, for the employment of Messrs. Weller, Tobin and Gendel, as their counsel, was granted by the Referee only after this Honorable Court had considered the evidence and heard the

arguments presented before this Court reversing the original *ex parte* orders of the same District Judge and Referee; this judgment was made and entered in proceeding No. 11370 and reported at 157 F. (2d) 910. (See Appendix.)

The facts and the record involved in the original appeal to this Court in the aforementioned proceeding, and numbered 11370, are before this Court pursuant to an order made by this Court on the 22nd day of August, 1947, permitting the incorporation of the transcript of record in the original proceeding to be before this Court by reference without reprinting. Appellants further respectfully urge that this Court consider the matters set forth in the appellants' opening brief in the original proceeding, as if the same were set forth verbatim in the within brief.

Originally, the Referee in Bankruptcy, without granting a court hearing, made an unsubstantiated *ex parte* order, in chambers, denying the verified petition of the trustees to employ certain counsel, all of whom are now appellants in the within proceeding. The District Judge approved this conduct and order of the Referee. This Honorable Court reversed the orders of the Referee and the District Judge on the basis that only in the rarest cases, after proper judicial deliberations in open court and the presentation of admissible and binding evidence, could a Referee in Bankruptcy deny an otherwise proper petition by trustees for employment of counsel of their own choice. Thereupon, your appellants sought to have a hearing in open court before the Referee in Bankruptcy at the earliest possible date, pursuant to the original verified petition for leave to employ counsel, filed on January 11,

1946. [Tr. pp. 24-25.] Hearings were held before the Referee and evidence was presented by your appellants on all subject matters to which the Referee in Bankruptcy directed the attention of the appellants; thereafter, the Referee in Bankruptcy made his findings of fact, conclusions of law, and again ordered that the original petition for leave to employ counsel be denied. [Tr. pp. 28-37.] An analysis of the alleged findings of fact (which we accept at face value for the purposes of this appeal), indicates no recognition of the rules of law laid down by this Court in proceeding No. 11370 governing denials of petitions for leave to employ counsel by trustees. After the Referee expressly finds that counsel proposed by the appellant trustees have no adverse interest to the estate, then, contrary to the rules of law laid down by this Honorable Court, the Referee determined that although not disqualified personally by any acts or conduct of the attorneys, some day some one, might suspect the Bankruptcy Court of making an improper order, and, predicated upon this fear, the original petition was denied.

A petition for review was duly filed before the District Judge [Tr. pp. 37-42], whereupon the matter was argued and presented to the District Judge on the 24th day of March, 1947. The matter was then taken under submission and an order, as heretofore described, was finally made by the District Judge on the 11th day of July, 1947. [Tr. pp. 44-49.]

In order to fully familiarize the District Judge with the completeness of the investigation and hearings held before the Referee in Bankruptcy, appellants provided the Court with a transcript of all oral testimony [Tr. pp. 60-162], as well as the exhibit record of all exhibits intro-

duced at the hearing. The appellants likewise respectfully pointed out to the District Judge that time was of the essence, for the reason that many complicated and complex legal matters had arisen in the conduct of the administration of the estate, and the trustees were desirous of being entitled to the use of the permanent counsel for the employment of whom they had originally filed their petition on January 11, 1946. The District Judge, in spite of having a complete transcript and record of the proceedings before the Referee in Bankruptcy, which transcript clearly answered the many inquiries made by him in his order of July 11, 1947, directed the Referee to hold further hearings and to make findings of fact and conclusions of law and an order on the same. We respectfully submit that the employment of counsel by a trustee in bankruptcy, involving a "live administration" affecting over a million dollars worth of assets, is certainly entitled to presentation to the Court and determination by the Court in as expeditious a manner as can be reasonably anticipated. Here we find the trustees in this complicated and sizeable estate, having filed a petition for the counsel of their choice on January 11, 1946, are still battling for recognition before the District Judge in July, 1947. Judicial wisdom, coated with a recognition of the pragmatic problems of such a bankruptcy administration, would have justified one of several courses of conduct by the District Judge:

Either reverse the Referee if his findings of fact were not sufficient to sustain his conclusions of law and order; or else, the District Judge should have made his own findings of fact and conclusions of law from the evidence theretofore submitted to the Referee, or he should

have taken such additional evidence as he deemed necessary to justify the District Court in making such other or further findings of fact and conclusions of law.[2]

There must be a reasonable termination to litigation of this character, particularly since it involves a continuing administration of substantial assets.[3]

We respectfully submit that an examination of the transcript of the testimony and of the exhibits presented before the Referee in Bankruptcy could leave no room for any reasonable judicial conclusion that the evidence to date, or any further investigation, would reveal that there could be any "good reason" or that this was one of those "rare cases" justifying the denial by the Referee or the District Judge of the petition for leave to employ.

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[2]Authority for the power of the District Court is found in the Bankruptcy Act, the Rules of Court, and is illustrated by analogous and extreme cases, referring to the *"sua sponte"* authority of the Court, such as:

Woodruff v. Heiser (C. C. A. 10th, 1945), 150 F. (2d) 867;

In the Matter of A. Roth Co., Inc. (C. C. A. 7th, 1942), 128 F. (2d) 428, 49 A. B. R. (N. S.) 453;

Biggs v. Mays (C. C. A. 8th, 1942), 125 F. (2d) 693, 48 A. B. R. (N. S.) 716.

Section 24 of the Bankruptcy Act appears to clearly invest this Honorable Circuit Court with full jurisdiction to revise and reverse the Referee and District Judge both as to matters of law and matters of fact. Anticipating that the query may arise as to whether or not the District Court had discretion to recommit the matter to the Referee, we respectfully submit that under all of the facts and circumstances before the District Court, the said Court should have finally determined the issues involved, without brooking further delay by recommitting the matter to the Referee.

[3]*Blue v. Herkmier Nat. Bk.* (C. C. A. 7, 1929), 30 F. (2d) 256 at 260: ". . . Of all classes of cases pending in the courts, bankruptcy proceedings are the last which should be delayed. To do so is a great injustice to creditors. Such delays foster just criticism and bring disrespect for the administration of justice."

Even accepting all of the findings of fact of the Referee, at face value, and without making any reference to the evidence upon which these findings were predicated (which evidence did not sustain any conclusions of fear of criticism on the part of the Referee) it is clearly evident that an application of the rules of law as laid down by this Court in the first appeal would unquestionably have required the District Judge to reverse the order of the Referee, and, predicated upon the very findings signed by the Referee, the original petition for leave to employ counsel should have been granted.[4]

III.

Specifications of Error.

The appellants rely upon the following specifications of error:

1. The "Order of the Judge on Petition for Review of Referee's Order [Tr. pp. 44-49] for leave to employ certain counsel, is erroneous in that there were no facts before the Referee or the District Judge which would in anywise justify the exercise of any possible judicial discretion to deny to the trustees in the within bankruptcy proceeding the right to employ qualified counsel of their own choice, where employment of counsel by said trustees was proper.

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[4]Before proceeding with the brief, we respectfully call the attention of this Court to the fact that Mr. Stewart McKee, one of the original appellants, resigned as a trustee, and his position was taken by Mr. McIntyre Faries, and Mr. Faries, as successor to Mr. McKee, has joined in the within appeal.

2. Said order is erroneous in that a referee in bankruptcy has no right to refuse to authorize trustees in bankruptcy to employ qualified counsel of their own choice when employment by said trustees is otherwise proper, unless facts, recognizable at a judicial hearing showing grave disqualifications of such counsel, and limited only to the rarest cases, are presented to the referee and are properly findings of fact in support of such an order.

3. That the order of the District Judge from which the within review is taken is erroneous for the reason that the matters involved before the District Judge and the Referee unreasonably delay the expressed desire of the trustees in the instant bankruptcy case to employ and use the counsel of their original choice, as reflected by their petition of January 11, 1946, rather than to continue to be compelled to use interim counsel; admittedly the administration of the instant case, from its inception, has required active and vigorous participation by the attorneys for the trustees; in view of the fact that considerable delay had been incurred by reason of the appellants being required to take the first appeal in this matter to this Honorable Court, and that further delay had been incurred by reason of the necessity for the hearing occasioned by the order of this Honorable Court (Appeal of *Sampsell et al.*, C. C. A. 9th, 1946 (157 F. (2d) 910)) in reversing the original orders of the Referee and District Judge in this matter, it would appear that said District Judge could have conducted such judicial

deliberations in the form of hearing further evidence if he deemed it necessary to enlarge upon the findings of fact as theretofore submitted to him by the Referee in Bankruptcy, rather than to re-refer the matters of inquiry to the Referee. It is the position of the appellants, predicated upon the evidence and the findings of fact submitted by the Referee in Bankruptcy in support of his order of February 12, 1947, that the sole judicial discretion exercisable by the District Judge was, and is, to grant the petition for review by appellants, and to reverse the order of the Referee.

4. That the order of the District Judge of July 11, 1947, was erroneous for the reason that it failed to contain therein findings of fact and conclusions of law supporting the position of the District Judge in refusing to grant the petition on review of the trustees and reversing the order of the Referee dated February 12, 1947.

5. That the order of the District Judge dated July 11, 1947, was erroneous in that it not only disregarded the law of the case, binding the aforesaid District Court and the Referee in Bankruptcy, created by virtue of the judgment of this Court made and entered in the appeal of *Sampsell, etc.* (C. C. A. 9th, 1946), 157 F. (2d) 910, but, also, that as to all pertinent inquiries which could concern the order made by the Referee on February 12, 1947, the aforesaid District Judge had before him all of the evidence and the findings of fact of the said Referee, which evidence and findings of fact unequivocally

demonstrated that this was not a case in which the Referee could exercise his judicial discretion and deny the appointment of counsel as requested by the trustees in their original petition filed January 11, 1946 [Old Tr. pp. 12-19]; that the aforesaid order of the District Judge dated July 11, 1947, is erroneous for the reason that the 21 items, to which the said Court directs the attention of the Referee in Bankruptcy, under subdivision 3 of said order are either covered in the evidence and findings of fact as submitted to the aforesaid District Judge, or are not matters which are properly to be considered by the Referee or District Judge in adjudging the original petition for leave to employ counsel as filed by the trustees in this proceeding. As an example of the statement of this point on appeal, your appellants respectfully direct the attention of this court to item No. 3-a contained in the order of the District Judge [Tr. p. 45]; in answer to this inquiry of the District Judge, the aforesaid Judge had before him a written and verified petition [Tr. pp. 24-25] for hearing signed by the trustees in bankruptcy requesting the Referee to grant their original petition of January 11, 1946, and filed with the Referee after this Honorable Court had reversed the order of May 13, 1946, made and entered by this District Judge; in addition thereto, the District Judge had before him the petition for review [Tr. pp. 37-42], likewise verified by the trustees in bankruptcy; how can the District Judge, with propriety, inquire as to whether or not the trustees ask that their petition filed January 11, 1946, be granted?

In subdivision 3-b [Tr. p. 45] of the July 11, 1947, order, the District Judge questions whether or not the verified petition of the trustees qualifies with the requirements of General Order 44, and this inquiry is made directly in the face of the judgment of this Court entered in the appeal of *Sampsell, et al* (C. C. A. 9th, 1946), 157 F. (2d) 910, wherein this Honorable Court stated as follows (see Appendix):

> ". . . Every requirement of General Order 44 is fully satisfied by the allegations of the petition . . ."

As a further example of the errors of the District Judge, we find, in paragraph "f" of subdivision 3 [Tr. p. 46], that the District Judge desires the Referee to make a finding as to whether or not the bankrupt is the *alter ego* of Arthur L. Bell. In view of the fact that the appellants have not challenged the finding of the Referee to the effect that Arthur L. Bell controlled and directed the bankrupt corporation [Tr. p. 30], how can we possibly be concerned with a collateral determination of a matter which might take many weeks of evidence to determine?

6. Said order is erroneous in that it deprives the trustees in bankruptcy of the right to select counsel of their own choice and it deprives the appellants in intervention of the right to follow their profession, all without due process of law, and because of the lower courts' undue and unjustifiable delay in the determination of the original petition for leave to employ counsel by the trustee.

IV.

SUMMARY OF THE ARGUMENT.

A. THE ORDER OF THE REFEREE DENYING THE PETITION OF THE TRUSTEES TO EMPLOY COUNSEL, AND THE ORDER OF THE JUDGE RECOMMITTING THE MATTER TO THE REFEREE FOR FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW, SHOULD BE REVERSED BECAUSE THERE WAS NO GOOD REASON FOR EITHER OF SAID ORDERS AND THE MAKING THEREOF CONSTITUTED ABUSES OF JUDICIAL DISCRETION, WHICH DISCRETION, AS INVOLVED IN THE INSTANT MATTER, IS TO BE EXERCISED ONLY IN THE RAREST CASES.

B. THE ORDER OF THE DISTRICT JUDGE RECOMMITTING THE MATTER TO THE REFEREE IS IN ERROR BECAUSE IT FAILS TO GIVE ANY RECOGNITION TO THE FUNDAMENTAL RULES OF LAW LAID DOWN BY THIS COURT IN THE PRIOR APPEAL, NO. 11370.

C. THERE ARE MANY AUTHORITIES SUSTAINING THE CONTENTION THAT NOT ALL PARTICIPATION BY A BANKRUPT OR HIS COUNSEL IS FORBIDDEN. IT IS ONLY OBJECTIONABLE WHEN THE BANKRUPT ATTEMPTS TO CONTROL THE ELECTION OF TRUSTEES OR SELECTION OF COUNSEL FOR HIS OWN SELFISH AND ADVERSE INTERESTS.

D. A BANKRUPT WRONGFULLY DESIRING TO ELIMINATE CERTAIN AGENCIES OR ATTORNEYS FROM PARTICIPATING IN THE ADMINISTRATION OF AN ESTATE COULD TAKE ADVANTAGE OF THE TYPE OF RULING ISSUED BY THE REFEREE HEREIN AND BAR SUCH AGENCIES OR COUNSEL BY MERELY SENDING OUT A BLANKET LETTER OF RECOMMENDATION. THE COURT MUST GO FURTHER AND FIND A CONSPIRACY, OR AT LEAST KNOWLEDGE OF THE RECOMMENDATION, PLUS A SELFISH INTEREST ON BEHALF OF THE BANKRUPT.

E. IN THE EVENT THAT THIS COURT WERE TO SUSTAIN THE RULING OF THE COURTS BELOW, IT WOULD ESTABLISH A POSSIBLE PRECEDENT FOR SOME REFEREE IN THE FUTURE TO USE THE REASONING OF THE ORDER OF FEBRUARY 12, 1947, AS A PREMISE FOR PROMOTING SELFISH INTERESTS; AFTER ALL, THE CONJURING UP OF A GHOST SUCH AS THE FACT THAT THERE MIGHT BE SOME UNWARRANTED SUSPICION OF THE BANKRUPTCY COURT IN THE FUTURE WOULD NOT NECESSITATE THE EXERCISE OF TOO MUCH IMAGINATION; THEREBY, THE REFEREE COULD DISQUALIFY COUNSEL AND BY INDIRECTION COULD OBTAIN THE EMPLOYMENT OF COUNSEL OF HIS OWN CHOICE. (AS HAS BEEN INDICATED BY THE THREAT OF THE EXERCISE OF A PRESIDENTIAL VETO, VERY OFTEN CONGRESS WILL PASS AN ENACTMENT MORE IN ACCORD WITH THE PRESIDENT'S VIEWS THAN IF HE HAD NOT EXERCISED THIS THREAT.)

F. IF THE COURTS BELOW INTENDED TO CRITICIZE SOLICITATION OF CLAIMS BY THE TRADE AGENCY DESCRIBED AS THE BOARD OF TRADE, THEY WOULD BE DOING SO CONTRARY TO THE UNDISPUTED WEIGHT OF AUTHORITY.

V.

ARGUMENT.

A. The Order of the Referee Denying the Petition of the Trustees to Employ Counsel, and the Order of the Judge Recommitting the Matter to the Referee for Further Findings of Fact and Conclusions of Law, Should Be Reversed Because There Was No Good Reason for Either of Said Orders and the Making Thereof Constituted Abuses of Judicial Discretion, Which Discretion, as Involved in the Instant Matter, Is to Be Exercised Only in the Rarest Cases.

An analysis of the findings of fact made by the Referee, as part of his order of February 12, 1947 [Tr. pp. 30-36], compels the reversal of the said order and the making of proper conclusions of law and an order by this Honorable Court granting the original petition of the trustees filed January 11, 1946—all pursuant to the provisions of Section 24 of the Bankruptcy Act. Subdivision "a" thereof gives appellate jurisdiction to this Honorable Court in either interlocutory or final proceedings in bankruptcy, and the right to either revise or reverse in both matters of law and matters of fact. To promote the ends of justice, this authority must be exercised by this Honorable Court in the instant proceeding.[5]

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[5]Comment on an analogous situation is found in the matter of *Central Railroad Co. of New Jersey* (C. C. A. 3rd, 1947), 163 F. (2d) 44. We find, commencing at page 53 of the opinion, a discussion of the discretion of the Bankruptcy Court, and the court therein points out, as far as the authority and duty of the Circuit Court of Appeals is concerned, as follows:

> ". . . The scope of this court's determination of such law is broad. 28 U. S. C. 225 (c); 11 U. S. C. 47. An appellate court may go behind discretion to ascertain correct legal stand-

(1) What was Bell's accepted purpose in recommending to creditors that if they didn't have their own attorneys—they should give their claims to the Board of Trade or to Raphael Dechter (now deceased), a Los Angeles attorney? [Tr. pp. 31-32]:

The claims would then

> ". . . be voted for a trustee or trustees who would be impartial and impersonal and who would not permit the administration of this estate to be influenced by the Attorney General of the State of California; . . ."

(2) Were Craig & Weller and their associates even aware that the bankrupt was recommending the Board of Trade as aforesaid? [Tr. p. 34]:

> *"I find that Craig & Weller or their associates do not represent any interest adverse to the trustees or this estate; . . ."*

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ards. *Bratt v. Western Air Lines,* 10 Cir., 155 F. (2d) 850, 853. Surely it may seek out and apply the law behind a mere erroneous assertion that discretion is the issue.

That assertion of the issue of discretion in this case has been rebutted by the law discussed. There is no reasonable choice of alternatives upon which discretion could be exercised. It cannot be said to be present in a failure 'to apply well settled law to a conceded state of facts.' *Union Tool Co. v. Wilson,* 259 U. S. 107, 112. We have not here, as the parties and the district court appear to believe, a question of which of two courts might better decide an issue. We have rather a question which only one court can effectively decide. In this situation, we do not find it necessary to decide whether or not there was an abuse of legal discretion by the District Court. There was an error of law. *In re Sobol,* 2 Cir., 242 Fed. 487, 489."

In other words, the appellants urge that the facts before both the Referee and the District Judge left no alternative to the District Judge, and that he should have reversed the order of the Referee without further delay.

(3) Was any real connection ever found by the Referee between the Board of Trade, the bankrupt and the voting of claims? [Tr. p. 34]:

> "I find, however, that there was a connection between Craig & Weller and their associates on the one hand and the bankrupt corporation on the other, *in that even if it was done without the knowledge* (italics ours) of the Board of Trade or of Craig & Weller or their associates, the members and affiliates of the bankrupt corporation did, in fact, follow the aforesaid instructions of Mr. Bell and did suggest to creditors in this case, either orally or in writing, that they place their claims with the said Board of Trade for voting purposes in the selection of the Trustee or trustees in this case, and, at the same time, the claims of the said creditors were being solicited by or on behalf of the said Board of Trade for such voting purposes, of which fact Craig & Weller and their associates had actual knowledge."

However carefully the findings are examined, from stem to stern, *there is no finding that even one single claim was voted by or through the Board of Trade which claim was recommended by the bankrupt.*

(4) From the above findings was the Referee justified in attempting to exercise his judical discretion on the basis of the two reasons (conclusions) which he placed in his findings of fact [Tr. p. 36]?

> (a) [Tr. p. 36]: "That the employment by the trustees of Craig & Weller and their associates would

> leave this Court and this estate open to the charge, even if it were unwarranted, that the said attorneys were influenced in the discharge of their duties and responsibilities, to the advantage or benefit of the bankrupt corporation or its president and dominating personality, Mr. Bell, by something which occurred at the time of the appointment of the trustees in this case."

**Nota Bona: "even if it were unwarranted"* and *"by something which occurred at the time of the appointment of the trustees in this case."* Not only would any charge or suspicion obviously be unwarranted, but the Referee participated in the examinations and proceedings and since he could find no "something which occurred" other than as set forth above, upon what imaginary basis are we to accept this reason as substantial evidence to support the exercise of judicial discretion!

> (b) [Tr. p. 36]: "That such charge, if made, even though it be proved to be without foundation, would bring into question the fair and impartial administration of this estate and would cast a doubt upon the integrity of this Court."

Again an unwarranted conclusion alleged as a reason for the exercise of judicial discretion; indeed, if fear of future investigation would govern our courts, even though admittedly unfounded, then must we concede that our courts are no longer governed by the fundamental concepts of due process of law so clearly enunciated by our Constitution and the decisions of our Supreme Court.

B. The Order of the District Judge Recommitting the Matter to the Referee Is in Error Because It Fails to Give Any Recognition to the Fundamental Rules of Law Laid Down by This Court in the Prior Appeal, No. 11370.

We respectfully submit that an analysis of the Referee's findings of fact, and the transcript of the testimony and exhibits before the Referee, gives to any impartial judicial review the answer to the various questions submitted by the order of the District Judge entered July 11, 1947, and specifically described as Subdivisions "a" to "u" of paragraph 3 of the aforesaid order. [Tr. pp. 45-49.]

(1) In subdivison "a" of paragraph 3 of the District Judge's order [Tr. p. 45] we find an inquiry as to whether or not the trustees now ask that their petition filed January 11, 1946, be granted; the District Judge had before him the verified petition of the aforesaid trustees seeking such an order, which petition was dated December 10, 1946 [Tr. pp. 24-25], and, in addition thereto, the verified petition of the trustees dated February 19, 1947 [Tr. pp. 37-42], being a petition for review of the Referee's order denying the right of the trustees to employ counsel. In the face of a record of this character, what justification is there for the inquiry of the District Judge as to whether or not the trustees now ask if their original petition to employ counsel be granted?

(2) Apparently the District Judge did not follow the contents of the judgment issued by this court in proceed-

ing No. 11370, for he asked the Referee to determine whether or not the verified petition of the trustees states "the reasons for (their) selection" as required by General Order 44 [Tr. p. 45]; if the District Judge had read the judgment of this Court passing on this verified petition in question, he would have found the matter *res judicata* in the following language: ". . . Every requirement of General Order 44 is fully satisfied by the allegations of the petition . . ." (See Appendix.)

Appellants could analyze, *seriatum,* all of the subdivisions of paragraph 3, and in each instance it would be obvious that the District Judge had before him the answer to his inquiry, or that the inquiry itself could not possibly affect the rights of the appellants herein as revealed by the contents of the record then before the District Judge.

C. There Are Many Authorities Sustaining the Contention That Not All Participation by a Bankrupt or His Counsel Is Forbidden. It Is Only Objectionable When the Bankrupt Attempts to Control the Election of Trustees or Selection of Counsel for His Own Selfish and Adverse Interests.[6]

D. A Bankrupt Wrongfully Desiring to Eliminate Certain Agencies or Attorneys From Participating in the Administration of an Estate Could Take Advantage of the Type of Ruling Issued by the Referee Herein and Bar Such Agencies or Counsel by Merely Sending Out a Blanket Letter of Recommendation. The Court Must Go Further and Find a Conspiracy, or at Least Knowledge of the Recommendation, Plus a Selfish Interest on Behalf of the Bankrupt.

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[6]*In the Matter of Crown* (C. C. A. 2d, 1941), 118 F. (2d) 198, 45 Am. B. R. (N. S.) 586:

In considering claim No. 12 the Court stated, at p. 201:

> ". . . To hold that a request to vote for particular candidate addressed to a creditor's attorney by an attorney representing independent creditors, or even by the bankrupt's attorney, was improper solicitation, seems fantastic. There is no evidence that this claim was voted in the interest of the bankrupt. *In re* Mayflower Hat Co. (C. C. A., 2nd Cir.), 23 Am. B. R. (N. S.) 366, 65 Fed. (2d) 330. The claim should be counted for Cregg."

In the Matter of Universal Seal Cap Co. (N. Y., 1941), 40 F. Supp. 420, 47 Am. B. R. (N. S.) 106. The fact that the attorney for a voting creditor had once represented the bankrupt corporation in trying to settle all claims, did not bar his participation in the election of a trustee. At page 110, Am. B. R. (N. S.) series the Court says, at p. 422:

> "In any event, in the absence of good cause and substantial reason for interference with the choice of creditors, the selection of a trustee develops upon them rather than upon the Court."

E. In the Event That This Court Were to Sustain the Ruling of the Courts Below, It Would Establish a Possible Precedent for Some Referee in the Future to Use the Reasoning of the Order, of February 12, 1947, as a Premise for Promoting Selfish Interests; After All, the Conjuring Up of a Ghost Such as the Fact That There Might Be Some Unwarranted Suspicion of the Bankruptcy Court in the Future Would Not Necessitate the Exercise of Too Much Imagination; Thereby, the Referee Could Disqualify Counsel and by Indirection Could Obtain the Employment of Counsel of His Own Choice. (As Has Been Indicated by the Threat of the Exercise of a Presidential Veto, Very Often Congress Will Pass an Enactment More in Accord With the President's Views Than if He Had Not Exercised This Threat.)

F. If the Courts Below Intended to Criticize Solicitation of Claims by the Trade Agency Described as the Board of Trade, They Would Be Doing so Contrary to the Undisputed Weight of Authority.

(1) The Los Angeles Credit Managers Association, and its long-time predecessor, which was dissolved some three years ago, Los Angeles Wholesaler's Board of Trade, has a fine record of service to the community and particularly to local businessmen. The activity of this organization in the bankruptcy field has done a great deal toward maintaining the high degree of efficiency for which our Southern District is ordinarily noted. The Southern District of New York and several other districts adopted a rule attempting to disqualify attorneys who

represented creditors from acting as attorneys for the trustee. As a direct and positive mandate to the contrary our Congress amended Section 44 of the Bankruptcy Act of 1938 (See Bankruptcy Act, Sec. 44c; 11 U. S. C. A. Sec. 72c) and expressly eliminated any disqualification on the ground that the proposed attorney for the trustee likewise represented general creditors.

(2) This subject matter is well presented in Vol. 2, 14th Edition of Collier on Bankruptcy commencing at page 1669 of the Text to and including page 1671. See also discussions in: *Rinderknecht v. Toledo Association of Credit Men* (D. C. Ohio, 1935-36), 13 Fed. Supp. 555 and in the article of Referee Irwin Kurtz entitled, "The Credit Men's Place in Bankruptcy Administration" found in Vol. 9 of Journal of the National Association of Referees in Bankruptcy, No. 3, published in April of 1935.

There never was a contention by the Referee or anyone else that any of the appellants participated in any solicitation of claims. Furthermore, we must not overlook the fact that if the last minute recommendations of the bankrupt had been successful, the claims involved would have been forwarded to an existing agency, to-wit, Los Angeles Board of Trade [Old Tr. p. 47], which agency was in no way connected with the Los Angeles Credit Managers Association, located at a different address, and which latter entity is the one represented by Craig & Weller and their associates. [Tr. p. 79.] Also,

no claims appear to have been filed by the aforesaid Los Angeles Board of Trade, either by any of the appellants herein or in any other manner. From the evidence considered by the Referee and from his findings, it is obvious that the activity of the bankrupt or his agents for the purpose of having claims voted "for a trustee or trustees who would be impartial and impersonal, and who would not permit this estate to be influenced by the Attorney General of the State of California; . . ." [Tr. pp. 31-32] was a purpose not carried out by any effectual solicitation.

Conclusion.

The Circuit Court of Appeals in the original proceeding before this Court rightfully ruled that your appellants were entitled to a hearing on their petition and a judicial deliberation on the issues involved. Tested in the atmosphere of open court proceedings, the findings of fact, as well as the evidence, reveal that the sole basis for the ruling of the Referee is his fear that some day the bankruptcy court might be subjected to suspicion, even though unwarranted. Obviously, this does not constitute a rare case, or good reason to deny the original petition for employment. The action taken by the District Judge in recommitting the matters involved to the Referee in Bankruptcy was an arbitrary exercise of his judicial discretion unwarranted under the circumstances and contrary to the promotion of the ends of justice, particularly since no foundation appears in the record before the Dis-

tract Judge which might possibly bring the findings of fact within the requirements of law as enunciated by this Honorable Court in order to justify a denial of the petition of the Trustees to employ counsel of their own choice.

Wherefore, your petitioners pray that this Court forthwith reverse the order of the Referee dated February 12, 1947 [Tr. pp. 28-37], reverse the recommitting order of the District Judge dated July 11, 1947 [Tr. pp. 44-49], and make and enter an order granting the original petition for employment of counsel by the trustees, as filed herein on the 11th day of January, 1946. [Old Tr. pp. 9-12.]

Respectfully submitted,

FRANK C. WELLER,
THOMAS S. TOBIN, and
MARTIN GENDEL,
By MARTIN GENDEL,
Attorneys for Appellants.

APPENDIX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of Christ's Church of the Golden Rule, a non-profit California corporation, Bankrupt, Paul W. Sampsell, L. Boteler and Stewart McKee, Trustees in Bankruptcy of the Estate of Christ's Church of the Golden Rule, a non-profit California corporation, Bankrupt, Frank C. Weller, Thomas S. Tobin and Martin Gendel, Appellants. No. 11,370, No. 15, 1946.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Denman, Healy and Bone, Circuit Judges.

DENMAN, *Circuit Judge*:

This is an appeal from an order of the District Court in the above bankruptcy proceeding confirming the denial by the referee of the petition of the above trustees for the employment of certain persons as their attorneys. The ground of the appeal is the claim that, without hearing on the petition, which satisfied all the requirements of General Order in Bankruptcy No. 44, the referee denied the employment of the attorneys sought by the trustees.

We think the court and referee erred in proceeding *ex parte* and in not having a hearing on the petition. General Order 44 provides

"No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, *which shall be granted only upon the verified peti-*

tion of the receiver, trustee, or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer . . ." (Emphasis supplied.)

An inspection of the trustees' verified petition shows that it stated the complicated character of the trustees' anticipated litigation, creating a special need of counsel for the successful discharge of the trustee obligation. Every requirement of General Order 44 is fully satisfied by the allegations of the petition. As was stated by the Second Circuit with reference to General Order 44 in the Matter of Mandell, 69 F. 2d 830,

"Only in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel, and the reasons which make it for the best interest of the estate to have the court select the attorney over the Trustee's objections should appear in the record."

The Fourth Circuit in *Kanter v. Robertson,* 102 F. 2d 92, 93, stated of the relations between the trustee and his attorney

". . . Ordinarily the choice of an attorney for the Trustee rests with the trustee subject to the approval or disapproval of the referee or judge, and the choice of the trustee should be confirmed unless good reasons appear to the contrary."

The reasons of the referee "to the contrary" were arrived at by an *ex parte* process of which the trustees had no knowledge until the order was entered. Thus the referee frustrated the *first* choice of the trustees for their attorneys for the important and difficult work before them.

The referee frankly says he makes no findings of fact on the allegations of the petition because the proceeding is *ex parte*. He states he was in receipt of certain communications which raised a question in his mind as to whether the proposed attorneys might have an interest which would disqualify them. We think that under General Order 44 the petitioning trustees are entitled to a hearing on their petition for a judicial deliberation on the matters the referee has in mind.

The trustees ask us to pass on the sufficiency of the matters outlined but not found in the referee's report to warrant a refusal to permit the employment of the proposed attorneys. This would be futile for we do not know what importance they may have as the issue is developed at the hearing.

The order appeal from is reversed and the case remanded for a hearing on the merits of the petition for the employment of the attorneys.

(Endorsed): Opinion. Filed Nov. 15, 1946. Paul P. O'Brien, Clerk.